

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

SHERRY COMBEN, TREASURER FOR THE
COUNTY OF ANTRIM,

Plaintiff-Appellee,

v

THE STATE OF MICHIGAN, JAY B. RISING
in his capacity as STATE TREASURER OF
MICHIGAN, and THE MICHIGAN
DEPARTMENT OF TREASURY,

Defendants-Appellants,

and

PURE RESOURCES, L.P., a Texas limited
partnership, DOMINION RESERVES, INC., a
Virginia corporation, WOLVERINE GAS &
OIL COMPANY, INC., a Michigan corporation,
WARD HEIRS BEING: EUGENIE R.
ANDERSON, STEPHEN WARD DEVINE,
ELIZABETH PALMER DEVINE WISEMAN,
MICHAEL EDMUND DEVINE, SUZANNE
LEE DEVINE, WILLIAM W. DUNN, DAVID
W. FAY, EDWIN R. FAY, PETER W. FAY,
ROBERT A. FAY, ROSAMOND S. FISHER,
FREDERICK T. GOLDING, successor trustee
under the Virginia W. Golding Trust Agreement
dated August 30, 1989, NANCY HAMILTON,
LISA MARRIOTT JONES, DAPHNE FAY
LANDRY, GEORGE S. LEISURE, JR., PETER
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FREDERICK S. STRONG III, ROBERT A.W.
STRONG, Revocable Trust u/a/d 4/17/02,
EUGENIE S. KAUFFMAN, THEIR HEIRS
AND ASSIGNS,

Defendants-Appellees.

Supreme Court Docket No. 127212

Court of Appeals Docket No. 248963

Antrim Circuit Court No. 02-7860-PS

**BRIEF OF AMICUS CURIAE
MICHIGAN OIL AND GAS
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**BRIEF OF AMICUS CURIAE
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STATEMENT OF QUESTIONS PRESENTED

- I. IS THE MINERAL FEE ESTATE IN OIL AND GAS EXEMPT FROM AD VALOREM REAL PROPERTY TAXES BY VIRTUE OF SECTION 15 OF THE SEVERANCE TAX ACT, MCL 205.301, *ET SEQ.*?

Trial Court's Answer: Yes
Court of Appeals' Answer: Yes
Appellants' Answer: No
Amicus MOGA's Answer: No, but the values associated therewith may not be considered for taxation purposes.

- II. IS THE MINERAL FEE ESTATE IN OIL AND GAS SUBJECT TO FORECLOSURE UNDER MCL 211.78k(5)(e)?

Trial Court's Answer: No
Court of Appeals' Answer: No
Appellants' Answer: Yes
Amicus MOGA's Answer: Yes

- III. IS THE INTEREST OF AN OIL AND GAS LESSEE EXEMPT FROM AD VALOREM REAL PROPERTY TAXES BY VIRTUE OF SECTION 15 OF THE SEVERANCE TAX ACT, MCL 205.301, *ET SEQ.*?

Trial Court's Answer: Yes
Court of Appeals' Answer: Yes
Appellants' Answer: Unclear
Amicus MOGA's Answer: Yes

- IV. IS THE INTEREST OF AN OIL AND GAS LESSEE SUBJECT TO FORECLOSURE UNDER MCL 211.78k(5)(e)?

Trial Court's Answer: No
Court of Appeals' Answer: Unclear
Appellants' Answer: Unclear
Amicus MOGA's Answer: No

- V. IS THE OWNER OF THE MINERAL FEE ESTATE IN OIL AND GAS ENTITLED TO NOTICE OF TAX FORECLOSURE PROCEEDINGS UNDER MCL 211.78k(5)(e)?

Trial Court's Answer: Did not address
Court of Appeals' Answer: Did not address
Appellants' Answer: Yes
Amicus MOGA's Answer: Yes

VI. IS THE LESSEE OF AN OIL AND GAS LEASE ENTITLED TO NOTICE OF TAX FORECLOSURE PROCEEDINGS UNDER MCL 211.78k(5)(e)?

Trial Court's Answer:	Did not address
Court of Appeals' Answer:	Did not address
Appellants' Answer:	If exempt, no. If subject to foreclosure, yes.
Amicus MOGA's Answer:	If exempt, no. If subject to foreclosure, yes.

INTEREST OF AMICUS CURIAE

The Michigan Oil and Gas Association (“MOGA”) is an association of more than 900 company and individual members who are engaged in all aspects of oil and gas exploration and production in Michigan. The members of MOGA include small, independent operators; major oil companies operating in Michigan; the oil and gas exploration arms of public utility companies; drilling, transportation and service companies; individual landowners and royalty owners; and professionals serving the oil and gas exploration and production industry.

The scope and extent of the exemption from taxation granted by the Severance Tax Act, MCL 205.301, *et seq.*, and the effect on oil and gas property interests of the tax foreclosure process set forth in the General Property Tax Act, MCL 211.1, *et seq.*, are matters of great importance to MOGA members. Substantial investments have been made in oil and gas exploration and production activities based upon longstanding case law and administrative practice which provided substantial certainty regarding who owns oil and gas property interests.

This case has the potential to disturb well-settled expectations in this regard. The case has the potential to invalidate oil and gas titles to potentially hundreds of thousands of acres acquired by the State of Michigan since 1929 under tax sale procedures assumed to be valid and efficacious at the time. The State of Michigan has granted many oil and gas leases on those tax reverted lands in the years since 1929. These leases were granted by the State in good faith, developed by the lessees in good faith with the financial backing of investors who invested in good faith, and the proceeds of production have been disbursed in good faith. Depending upon the ultimate decision in this case, lessees who have been operating oil and gas fields including state leases in good faith could be subject to questions arising as to the validity of their leasehold titles.

To the extent the decision in this case could invalidate oil and gas titles acquired by the State of Michigan, determining who might own the oil and gas rights would be very problematic. Many of

the putative owners would have been individuals who have long since died and did not dispose of interests in their wills because they did not think they owned such interests, or the interests of the putative owners may have been companies or trusts since disbanded. Determining current ownership would be complex, if not impossible, especially when one considers that questions of adverse possession, estoppel, laches, and mineral dormancy under MCL 554.291 *et seq.*, would all have to be considered in determining ownership.

As the representative of numerous individuals and companies engaged in oil and gas exploration and production in Michigan, MOGA believes that it is in a unique position to assist the Court in its determination of the legal and public policy issues presented in this case.

SUMMARY OF ARGUMENT

MOGA supports one position taken by Appellant and Amicus Real Property Law Section (“RPLS”): The mineral¹ fee estate in oil and gas (whether severed² from the surface estate or not) is not exempt from ad valorem taxes and is subject to being extinguished by foreclosure under the General Property Tax Act, MCL 211.1 *et seq.* However, MOGA disagrees with Appellant on an assessment/valuation issue not addressed by the trial court or the Court of Appeals. MOGA contends that any value associated with the mineral fee estate (whether severed or not) may not be considered for ad valorem taxation purposes.

MOGA supports two positions taken by Appellees: The interest of an oil and gas lessee is (1) exempt from ad valorem taxation under the General Property Tax Act and (2) unaffected by

¹ For purposes of this brief, the terms “mineral” and “oil and gas” are used interchangeably to refer to oil, gas and other fluid hydrocarbons.

² The term “severed” is commonly used in two distinct contexts. In a title sense, fee ownership of mineral interests and other interests in real property can be “severed” from the ownership of the surface estate. In a different context, minerals such as oil and gas can be physically “severed” from soil, i.e., removed from the earth.

foreclosure against the surface estate under the General Property Tax Act. This is true regardless of whether the lessee has a lease from the fee owner of the property (in cases where the mineral fee estate has not been severed) or a lease from the owner of a several mineral fee estate (in cases where the mineral fee estate has been severed from the “surface” ownership). If the fee mineral interest is acquired by a foreclosing governmental unit through the foreclosure process, that interest remains subject to the lessee’s interest under an oil and gas lease that preexisted the tax delinquency.

A. Real And Personal Property Interests That Are Exempt From Ad Valorem Taxation Are Not Affected By The Tax Foreclosure Process.

Michigan case law has long recognized that if a property interest separated or severed by ownership from the whole of a parcel is exempt from ad valorem taxation, a tax foreclosure proceeding pertaining to the parcel does not affect or extinguish the exempt interest. In *Hammond v Auditor General*, 70 Mich App 149; 245 NW2d 545 (1976), the State of Michigan acquired a parcel of property by tax reversion and sold the property, while reserving the mineral rights. The property was subsequently sold at a tax sale for delinquent taxes and a private bidder purchased the tax lien and perfected title, giving notice to, among others, the State of Michigan as the holder of the severed mineral interest. In a subsequent quiet title action, the Court of Appeals held that the State-owned interest was exempt from taxation and thus from the effect of the tax sale. 70 Mich App at 153.³ See also *Smith v Auditor General*, 138 Mich 582; 101 NW 807 (1904) (exempt railroad property crossing a larger parcel of tax delinquent property was not subject to foreclosure, even though the tax description and tax deed did not exclude the railroad property); *Porter v Auditor General*, 255 Mich

³ Defendants-Appellants are in complete agreement with this statement of the law. See Defendants-Appellants’ Brief at p 25. Defendants-Appellants do not dispute that the clear import of the *Hammond* case is that if an interest is exempt from taxation, it is not subject to being extinguished in a tax forfeiture or foreclosure process.

526; 238 NW 185 (1931) (public land was exempt from taxation and tax foreclosure and tax deed were void as to the public land, but otherwise valid).

B. Section 15 Of The Severance Tax Act Exempts From Ad Valorem Taxation Only (1) Oil And Gas Reduced To Possession At The Surface Of The Earth And The Values Created Thereby And (2) Any Interest Held By An Oil And Gas Lessee.

Section 15 of the Severance Tax Act, MCL 205.315, exempts two categories of interests from ad valorem (and other) taxation. The first category is “oil or gas, the property rights attached thereto or inherent therein, or the values created thereby.” This appears to be the category as to which there is the greatest dispute in this case. That dispute pertains to whether (a) this category is limited to oil and gas which has been produced from beneath the surface of the earth and thus is personal property, along with any related property rights therein and values created thereby, or (b) this category includes the mineral fee estate in oil and gas in a property, whether that fee mineral estate is severed from the surface estate or not.⁴

For the reasons stated below, it is MOGA’s position that this first category of interests exempted by the Severance Tax Act is limited to oil and gas which has been produced and thus is personal property, and to such other property rights and values as are created by or derived from the oil and gas produced. An interest in the mineral fee estate in oil and gas is not exempted by this provision, or any other provision in the Severance Tax Act, and thus would not be excluded from a

⁴ Ownership of minerals, including oil and gas in place, may be severed from the remainder of land by proper conveyances. Severance of all interests in minerals from the remainder of land creates a freehold estate in fee simple in the minerals. *See Rathbun v State of Michigan*, 284 Mich 521, 534-536; 288 NW 35 (1938). While the discussion in the trial court and Court of Appeals’ opinions is primarily focused upon the separate fee estate in oil and gas which has been severed from the surface estate, MOGA’s analysis of the questions raised by the interplay of the Severance Tax Act and the foreclosure provisions of the General Property Tax Act will include the effect on such rights in oil and gas as are owned by a person in lands where there has been no severance. Thus, for the purposes of this Brief, the ownership rights in oil and gas in place will generally be referred to as the “mineral fee estate,” regardless of whether there has been an actual severance of the ownership of the mineral fee estate from the surface estate.

foreclosure process instituted with regard to delinquent taxes assessed against the property. This does not mean that the mineral fee estate can, as a part of the General Property Tax Act assessment and taxation process, be deemed to add value to the property from which the oil and gas can be produced. This has never been the practice of assessors since enactment of the Severance Tax Act. Further, assessment or taxation of the real property based on the consideration of such value would be a tax on values created by oil and gas, something clearly prohibited by the Severance Tax Act.

The second category of interests which are exempted by Section 15 of the Severance Tax Act includes “all leases or the rights to develop and operate any lands of this state for oil and gas, the values created thereby and the property rights attached to or inherent therein.” As will be discussed further below, this provision specifically exempts the real property interest held by the lessee under an oil and gas lease, the values created thereby and property rights attached to or inherent therein. Because the oil and gas lessee interests are exempt from taxation, these interests are not subject to foreclosure under the General Property Tax Act, and a foreclosing unit of government acquiring property subject to an oil and gas lease takes the interest acquired through the property tax foreclosure process subject to that lease. The lessee’s interest exempted by Section 15 is unaffected by a foreclosure proceeding involving the surface estate regardless of whether the mineral fee estate has been severed from the surface estate or not.

1. Section 15 Of The Severance Tax Act Exempts Produced Oil And Gas. It Does Not Exempt The Mineral Fee Estate In Oil And Gas.

Under Michigan law, oil or gas in the ground is not owned as such by the owner of the mineral fee estate in the property within which the oil and gas exists. As noted in *Michigan Consolidated Gas Co v Muzeck*, 4 Mich App 502, 507; 145 NW2d 266 (1966), “[t]he only ownership that one can have in unproduced oil and gas is the right . . . to reduce the same to

possession and thereby acquire title thereto.” Oil and gas once produced is deemed personal property. *See Eadus v Hunter*, 268 Mich 233, 237-238; 256 NW 323 (1934).

The language defining the first category of interests exempted under Section 15 of the Severance Tax Act is “oil or gas, the property rights attached thereto or inherent therein, or the values created thereby.” One question before this Court is whether this language includes not only oil or gas reduced to possession at the surface of the earth through production operations⁵ but also the mineral fee estate – a real property interest. Turning to the definitions set forth in MCL 205.311, one finds that the Legislature defined the word “oil” as used in the Severance Tax Act to mean “petroleum oil, mineral oil, or other oil taken from the earth” (emphasis added). This definition has been part of the statute since its enactment in 1929. The definition of “gas” is somewhat less instructive as it simply is defined as not including “methane gas extracted from a landfill.” However, the concept of taking or extracting is a part of this definition just as it is for the definition of “oil.”

These definitions indicate that when the Legislature used the phrase “oil or gas” in Section 15 of the Severance Tax Act, it was referring only to those substances that have been taken or extracted from the earth. In this respect the mineral fee estate is not included. Thus, references to “the property rights attached thereto or inherent therein, or the values created thereby” must in this context be deemed to include only those property rights or derived values that are a part of, or flow from, oil and gas which has been produced to the surface of the earth. Under this reading of the language of the statute, the real property interest in the unproduced oil and gas held by either the owner of the surface estate (if there has been no severance of that interest) or by an owner of the

⁵ Such oil and gas is sometimes referred to as “severed” from the ground; thus the name of the tax – “Severance Tax.” This sense of the word “severed” is different from what is meant by a “severed mineral estate” or interest.

severed mineral fee estate (if there has been a severance), is not exempt from ad valorem taxation of the entire parcel and thus is subject to a tax foreclosure and sale pertaining to the parcel.

Supporting this interpretation is the manner in which the Legislature referenced severed mineral fee estate interests in the Dormant Minerals Act, MCL 554.291, *et seq.* In that statute,⁶ which is directed solely at real property interests in oil and gas, the Legislature referred to the real property interests as “interests in oil and gas in any land owned by any person other than the owner of the surface.” MCL 554.291. Had the Legislature intended to include the mineral fee estate in the exemption from taxation created by Section 15 of the Severance Tax Act, it would have included language similar to the phrase “in any land” as used in the Dormant Minerals Act. Additionally, when the Legislature intended to include real property interests in oil and gas within the Section 15 exemption, it specifically referred to such interests. *See* the discussion in Section B.2. below regarding the reference to leases and related real property interests in Section 15.

MOGA’s interpretation of the Severance Tax Act avoids a very peculiar result in cases where there is unified ownership of the surface and mineral estates. For if the fee mineral interest in oil and gas were deemed to be exempt, there would be no basis in the language of Section 15 to limit the exemption to fee mineral estates that were severed prior to the tax delinquency. The exemption would have to apply equally to the mineral estate when owned by the surface owner. This would lead to a chaotic situation in which the owners of tax-foreclosed lands where there has been no mineral severance could claim that the mineral interest was exempt and not subject to the foreclosure proceedings, and therefore retained by the delinquent tax owner.⁷ This result clearly cannot have been intended.

⁶ MOGA agrees with Defendants-Appellants that the Dormant Minerals Act does not prevent forfeiture and foreclosure from terminating severed fee mineral interests.

⁷ This concern was shared by the Court of Appeals at 263 Mich App 480.

It is MOGA's position that a mineral fee estate in oil and gas, whether severed or not, is not exempted by Section 15 of the Severance Tax Act, and thus is affected by the foreclosure process provided in the General Property Tax Act for delinquent taxes assessed to the surface estate owner. Such interests are extinguished by the tax foreclosure if all procedural protections specified in the act and in the state and federal constitutions are satisfied.

MOGA disagrees, however, with Appellants' apparent position that the General Property Tax Act requires inclusion or consideration of the value of severed or unsevered interests in oil and gas in a parcel when assessing that parcel. (Appellants' Brief, pp 21-22) To MOGA's knowledge, this has never been done in the 75-plus years since the Severance Tax Act was enacted. Further, there has been no direction to, nor has it been the practice of assessors to include or consider the value of severed or unsevered mineral fee interests in a parcel in assessing that parcel. *See* the Affidavit of Assessor David Grimm, Appendix 86b of Appellees' brief. This is consistent with the language found in Section 15 of the Severance Tax Act which exempts from taxation values attributable to oil and gas interests.

2. The Interest Of An Oil And Gas Lessee Is Exempt From Ad Valorem Taxation And Is Not Subject To Foreclosure Under The General Property Tax Act.

Where an oil and gas lease has been executed, Section 15 of the Severance Tax Act expressly exempts the lessee's interest created thereby from ad valorem (and other) taxes. Under the authority set forth in Section A above, this lessee's interest is not subject to or affected by foreclosure under the General Property Tax Act.

Section 15 of the Severance Tax Act provides:

The severance tax herein provided shall be in lieu of all other taxes, state or local, . . . upon all leases or the rights to develop and operate any lands of this state for oil or gas, the values created thereby and the property rights attached to or inherent therein.

This language in Section 15 of the Severance Tax Act exempting a second category of interests from taxation (“all leases or the rights to develop and operate any lands in the state for oil and gas, the values created thereby and the property rights attached to or inherent therein”) differs from the first category of exempt interests discussed above in Section B.1. (the “oil or gas”) in terms of the type of property exempted. The language used clearly includes a leasehold interest created by the execution of an oil and gas lease. Under an oil and gas lease, the owner of the mineral fee estate in the oil and gas (whether severed or unsevered) and the oil and gas lessee agree that the lessee will have the exclusive right pursuant to the lease to develop and operate the leased lands for oil and gas.

Michigan law recognizes that an oil and gas lease creates a real property interest. *Thomas v Stevernot*, 185 Mich App 148, 152; 460 NW2d 577 (1990). An oil and gas lease creates in the lessee the exclusive right to produce and operate property for oil and gas:

“Clearly, an oil and gas lease is a transfer of an interest in oil and gas. [Citation omitted] The typical lease grants the lessee the exclusive right to enter the land to explore, drill, and produce oil and gas. The lessor retains a reversionary interest in the mineral estate. [Citation omitted] At termination of such a lease, the oil and gas rights revert to ‘the grantors of the lease, their heirs or assigns.’” [Citation omitted] *Energetics Ltd v Whitmill*, 442 Mich 38, 47; 497 NW2d 497 (1993).

Thus, Section 15 of the Severance Tax Act unambiguously exempts from ad valorem taxation (and other taxes) a real property interest within a parcel of land held by a lessee of oil and gas. Under the reasoning and authority of Section A above, such interest is not subject to tax lien or to foreclosure under the General Property Tax Act, and a foreclosing governmental unit acquires tax delinquent property subject to the preexisting oil and gas lease.⁸

⁸ The Court of Appeals’ opinion at 263 Mich App at 483 discusses various partial ownership interests (including leases) in a parcel of land that carry no tax obligation but yet might be at risk of tax foreclosure. The fact that other leasehold interests may be at risk of tax foreclosure is immaterial to the question before this Court, as none of the interests listed by the Court of Appeals is specifically exempted from ad valorem taxation as are oil and gas leases. Commercial and residential leases are subject to ad valorem tax as part of the real property that they cover and in fact many of those types of leases provide that the lessee will pay the tax on the property leased. The

This relationship between Section 15 of the Severance Tax Act and the General Property Tax Act foreclosure provisions does not appear to be disputed by any party to the case. *See* Brief of Defendants-Appellants at pp 25, 33, 35, 36 and 49; *see* Reply Brief of Dominion Reserves and Wolverine Gas & Oil Company, Inc. filed with the Court on November 1, 2004 at pp 4-5; *see* Reply Brief of Pure Resources, et al. at pp 14-15. The trial court's order specifically sets forth its holding that foreclosure under the General Property Tax Act does not extinguish oil and gas leasehold interests.⁹ Trial Court Order of May 17, 2003 at p 3; Defendants-Appellants' Appendix at p 41a.¹⁰

A question which may be asked with regard to the exemption for leases from Section 15 of the Severance Tax Act is whether exemption applies not just to a lessee's interest but also the lessor's interest. MOGA believes the answer to this question is "No." While the execution of the lease (oil and gas or other types) may create both a lessee's interest and a lessor's interest, it is the lessee who is granted the "exclusive" right to develop and operate the leased lands for oil and gas. *See Energetics Ltd v Whitmill*, 442 Mich at 47. The lessor (the owner of the mineral fee estate), whether severed or unsevered, does not have the right to develop and operate the leased lands for oil and gas. The language of Section 15 following the word "leases" ("or the rights to develop and operate any lands in the state for oil and gas") demonstrates that the Legislature intended this

person required to pay the taxes on the property is a matter of contract, not tax law. Contrary to the reasoning of the Court of Appeals, the special treatment (exemption) of oil and gas leasehold interests under Section 15 of the Severance Tax Act *does compel* the conclusion that such interests are not extinguished through the property tax foreclosure process.

⁹ The trial court also held that foreclosure under the General Property Tax Act does not extinguish *severed* mineral fee interests. In that respect, MOGA respectfully disagrees with the trial court's holding.

¹⁰ The Court of Appeals did not distinguish between interests in mineral fee estates and leasehold interests in its opinion.

exemption to apply to the lessee's interest. The lessor under an oil and gas lease has no such developmental or operational rights.

A holding that the lessor's interest is not exempt pursuant to Section 15 of the Severance Tax Act (and therefore can be affected by a tax foreclosure) also is justified by public policy considerations. It avoids a situation where the tax foreclosure process would separate ownership of the mineral fee estate from ownership of the lessor's interest under the lease. Any separation of these two interests would unduly complicate titles and lead to bizarre results.

To summarize, MOGA's position is that Section 15 of the Severance Tax Act does not exempt from taxation a severed mineral fee estate in unproduced oil and gas or, where there has been no severance of the mineral estate, the estate of the "surface" owner in unproduced oil and gas. Thus such interests would be affected by foreclosure under the General Property Tax Act. At the same time, such interests in unproduced oil and gas cannot be considered in the assessment and taxation of the parcel within which they lie. This has not been the practice of assessors and to do so would result in a tax based on the values of the oil and gas when produced – something clearly prohibited under the first part of the Section 15 exemption provision. Inasmuch as these interests could be affected by a foreclosure under the General Property Tax Act, appropriate advance notice must be given to the owners of such interests before any foreclosure proceeding.

MOGA's position is the same as regards the *lessor's* interest under an oil and gas lease. It is not exempt and may be affected by tax foreclosure. The lessor is entitled to appropriate advance notice of any foreclosure proceeding. As is true regarding the fee mineral estate (whether severed or not), the values involved may not be considered for ad valorem taxation purposes.

If there is an oil and gas lease, the *lessee's* interest under an oil and gas lease is in all respects exempt from taxation and not subject to foreclosure under the General Property Tax Act. A

foreclosing governmental unit acquiring tax delinquent property where there is a preexisting oil and gas lease acquires its interest subject to that lease. As such, while the foreclosing governmental unit may acquire the fee mineral estate and the *lessor's* interest under an existing oil and gas lease (if any), the *lessee* retains the exclusive right to produce those minerals and the foreclosing governmental unit will be entitled to receive royalties in accordance with the terms of the preexisting lease.

C. If, Contrary To MOGA's View, The Lessee's Interest Under An Oil And Gas Lease Is Affected By Foreclosure Proceedings Under The General Property Tax Act, The Lessee Is Entitled To Notice Of Foreclosure Proceedings.

In this Court's Order granting leave to appeal, the Court asked the parties to include among the issues briefed "(2) whether a lessee of mineral rights who has leased the rights from the surface estate owner is (a) entitled to notice in foreclosure proceedings under the General Property Tax Act, MCL 211.78k(5)(e), or (b) has a 'severed' mineral interest that is unaffected by foreclosure proceedings involving the surface estate."

As discussed in detail in Section B.2. of this brief, it is MOGA's position that the lessee's interest is unaffected by foreclosure proceedings involving the real property subject to the oil and gas lease, regardless of whether or not the fee mineral estate has been severed from the surface estate. There simply is no basis in the language of the Severance Tax Act to distinguish the exemption granted for "leases" based upon whether the leased fee mineral interest has or has not been severed from the surface estate. A holding consistent with MOGA's position on this would render moot question (2)(a).

If, however, this Court were to hold that a lessee's interest in such cases is extinguished by the foreclosure proceedings, MOGA believes that the lessee is entitled to proper advance notice of the foreclosure proceedings. MOGA agrees with the recitation of the supporting authority for this

position set forth in Defendants-Appellants' Brief in Sections V and VI. Clearly, an oil and gas lessee holds a significant property interest, and if such interest is to be affected by foreclosure proceedings under the General Property Tax Act, the lessee is entitled to proper advance notice of the proceedings.

MOGA disagrees with that portion of Defendants-Appellants' discussion in Section VI of their brief that appears to conclude that while an oil and gas lessee's interest is exempt from taxation, and not affected by foreclosure, such lessee's interest could be "canceled" if the mineral interest subject to the lease is foreclosed upon pursuant to the General Property Tax Act. This is inconsistent with the position taken by Defendants-Appellants earlier in their brief that interests exempted by the Severance Tax Act are not extinguished by foreclosure undertaken pursuant to the General Property Tax Act. Defendants-Appellants' Brief at pp 25 and 49. Furthermore, in each of the cases cited by Defendants-Appellants for this position, the lease deemed extinguished (by land contract forfeiture in *Tilchin v Boucher*, 328 Mich 355; 43 NW2d 885 (1956); by mortgage in *Dolese v Bellows-Claude Neon Co*, 261 Mich 57; 245 NW 569 (1932)), was entered into *after* the creation of the interest being foreclosed upon. In other words, the lease was entered into subsequent to and subject to the land contract or mortgage in question. By contrast, an oil and gas lease existing prior to any tax delinquency and the associated lien would be superior to a later created interest arising out of the delinquency.¹¹ See generally *Kirchen v Remenga*, 291 Mich 94, 109-110; 288 NW 344 (1939) (interest acquired by mortgagee through foreclosure is subject to interest of third party in the

¹¹ The argument raised by Amicus Curiae RPLS in Section II of its brief contains the same flaw. Regardless of whether a foreclosure proceeding is in rem or not, foreclosure of an interest created through a tax delinquency occurring after the date of an oil and gas lease does not affect a prior-in-time and thus superior interest, unless the foreclosing party has somehow been given priority over the lease. The Amicus Curiae RPLS's argument thus begs the question of whether the interest acquired due to a tax delinquency has priority over a lessee's interest. As discussed above, the statutory scheme demonstrates this is not the case.

foreclosed property existing prior to the date of mortgage); *Plaza Investment Co v Abel*, 8 Mich App 19, 25; 153 NW2d 379 (1967) (a transferee of a landlord's interest in a lease takes subject to the lessee's interest); *Doctor v Muskegon Oil Corp*, 246 Mich 62, 64; 224 NW2d 398 (1929) (recorded interest of an oil and gas lessee takes precedence over preexisting but unrecorded land contract vendee interest).

CONCLUSION AND RELIEF REQUESTED

MOGA requests that this Court issue a ruling consistent with longstanding case law and settled expectations. That holding should provide that

1. the mineral fee estate in oil and gas in a parcel can, if proper notice is provided to the owner thereof, be affected by a tax foreclosure proceeding under the General Property Tax Act; and
2. the interest of an oil and gas lessee is not affected by a tax foreclosure under the General Property Tax Act, and the foreclosing unit of government takes the property subject to preexisting oil and gas leases.

MOGA believes that these positions are consistent with the language and intent of the Severance Tax Act and the General Property Tax Act, and are consistent with the longstanding practice and well settled expectations of taxing authorities, mineral fee estate owners, and oil and gas lessees and lessors.

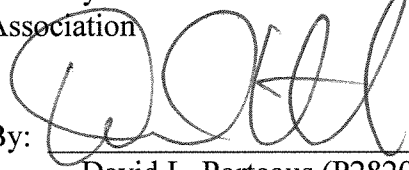
If the Court determines that the recent amendments to the General Property Tax Act foreclosure provisions alter this situation, such holding should be given prospective effect only, given that leasing and well drilling decisions for many years have been made based upon the state of the law and longstanding expectations. *See Pohutski v City of Allen Park*, 465 Mich 675, 697; 641 NW2d 219 (2002).

Respectfully submitted,

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Association

Dated: January 26, 2006

By:

A handwritten signature in dark ink, appearing to read 'D. Porteous', written over a horizontal line.

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